No. 88-1663

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

VICTOR F. HIMMELWRIGHT,

Petitioner,

vs.

WILLIAM H. FAUVER, COMMISSIONER, DEPARTMENT OF CORRECTIONS, STATE OF NEW JERSEY AND W. GARY EDWARDS, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Did the Court of Appeals in denying the petitioner's application for issuance of a certificate of probable cause to appeal the district court's denial of his petition for a writ of habeas corpus do so despite the petitioner's substantial showing of the denial of a federal right, the petitioner having presented the following questions:

1. In a case in which the petitioner's credibility on the issue of intent to defraud was the crux of defense did the admission into evidence of a statement of a judge, made at the conclusion of a civil trial involving the petitioner, that he, the judge, was referring the record in the civil trial to the prosecutor's office violate the petitioner's right of confrontation, right to a jury trial and due process of law when it is considered that the statement was used by the trial prosecutor in his summation to argue to the jury that the petitioner's trial testimony was not to be believed because the judge in the civil case did not believe the petitioner?

2. Did the district court's failure to conduct an evidentiary hearing on the petitioner's claim that his right to due process of law was violated by his trial judge who failed to disqualify himself, violate this Court's holdings in *Townsend v. Sain*, 372 U.S. 293, 313 (1963) and *Walker v. Johnson*, 312 U.S. 275 (1941) as well as the mandates of 28 U.S.C. § 2254(d)(1) (2) and (3)?

LIST OF PARTIES

Petitioner:

Victor F. Himmelwright

Respondents:

William H. Fauver, Commissioner
Department of Corrections
State of New Jersey

W. Gary Edwards, Attorney General
of the State of New Jersey

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Victor F. Himmelwright respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The order of the Court of Appeals filed on December 29, 1988, from which this petition is filed, is not reported (Appendix A, *infra*, 1a-2a). The opinion and order of the district court filed on August 23, 1988 is not reported (Appendix B, *infra*, 3a-10a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1988 (*infra,* 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in Section 1 as follow:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2253, provides:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. § 2254(d)(1), (2) and (3) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by

a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing; . . . .

STATEMENT OF THE CASE[1]

On January 23, 1988 the petitioner in accord with 28 U.S.C.

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1. For purposes of clarity, references made *infra*, regarding the trial transcript will be cited as follows:

Volume I -	Trial Testimony, May 2, 1984
Volume II -	Trial Testimony, May 3, 1984
Volume III -	Trial Testimony, May 4, 1984
Volume IV -	Trial Testimony, May 7, 1984
Volume V -	Trial Testimony, May 8, 1984
Volume VI -	Trial Testimony, May 9, 1984
Volume VII -	Trial Testimony, May 10, 1984
Volume VIII -	Trial Testimony, May 11, 1984
Volume IX -	Trial Testimony, May 14, 1984
Volume X -	Trial Testimony, June 22, 1984

References to the petitioner's appendix in the state court will be cited as (SA__a).

§ 2254(a) filed a petition for a writ of habeas corpus. On August 23, 1988 the petition was dismissed, without a hearing, after the district court first made a finding that the petitioner met the exhaustion requirements of 28 U.S.C. § 2254(b) (*infra,* 3a-10a). The district court also issued an order of no probable cause for appeal (*infra,* 10a).

On December 30, 1988, the petitioner's application for issuance of a certificate of probable cause was denied by the United States Court of Appeals for the Third Circuit (*infra,* 1a-2a).

The petitioner sought issuance of a writ of habeas corpus to obtain relief from his conviction on all eleven (11) counts of an indictment returned in Essex County, New Jersey charging him, a then licensed psychologist, with submitting false insurance claims to the Prudential Insurance Company of America (hereinafter "Prudential") in connection with patients under his care. The petitioner received an aggregate eight-year term of imprisonment, fines and penalties totalling $40,775 and was ordered to make restitution to Prudential in the amount of $38,360, which was later reduced to $30,280 (*infra,* 4a).[2]

The petitioner's direct appeal of his conviction to the Superior Court of New Jersey, Appellate Division, was denied on June 27, 1986 (Appendix D, 12a-16a). On October 17, 1986 the Supreme Court of New Jersey denied the petitioner's petition for certification to review his conviction (Appendix C, 11a).

At trial the prosecution contended the petitioner submitted false claims between June, 1977 and October 13, 1980 by billing Prudential: (1) for sessions which never occurred; (2) group sessions as individual sessions; (3) for therapy not covered by the patient's contract; (4) for sessions given by a nonlicensed therapist, contrary

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2. Petitioner is currently on parole (*infra,* 4a).

to the Prudential's contract with the patient; and (5) at a higher rate than quoted the patient (*infra*, 4a).

The respondents, in the district court, summarized the petitioner's trial testimony and defense in the following way:

> The crux of petitioner's defense . . . was that he lacked the requisite intent and knowledge to be guilty of the charges against him. He did not deny submitting the bills to Prudential, but he did, in sum, deny knowing that his billing methods were wrong and that he had any willful intent to defraud Prudential . . . .

Respondent's Answer to Petition, p. 10.

In the district court the petitioner contended his right to a jury trial, his right to due process of law and his Sixth Amendment right of confrontation were denied in his trial by the admission into evidence of a hearsay statement inculpatory of the petitioner made by the Honorable John W. Bissell, U.S.D.J., who at the time the statement was made was sitting in the Essex County District Court. The hearsay statement was made by Judge Bissell at the close of a civil trial in which the petitioner sued a former patient for fees and concerned Judge Bissell's conclusion regarding the petitioner's testimony about his billing practices. The statement was, as follows:

> However, during our luncheon recess in discharging what I thought was my duty, I conferred with members of the Fraud Squad of the Essex County Prosecutor's Office. Pursuant to my discussions with that office I am ordering a transcript of this trial for the Prosecutor's review and am retaining in the file the documents which

> have been introduced into evidence. This aspect of the matter has not been officially referred to the Prosecutor's Office and any further requests or inquiries in that regard should be made to that office.

Vol. IV, T:147-1 to 16.

The prosecution in disputing the petitioner's claims that he lacked the requisite knowledge and intent to commit the crimes urged the jury not to believe his trial testimony. The trial prosecutor's primary weapon in his attack upon the petitioner's credibility was the hearsay statement of Judge Bissell. The trial prosecutor in his summation, stated the following:

> [The petitioner] chose to testify because he thinks he can fool you just the way he fooled his patients, just the way he tricked the insurance company, just the way he thought maybe he could put one over on Judge Bissell, that maybe the Judge wouldn't be listening that carefully to his testimony, even as he sits there now he thinks that he has you fooled. But, I don't think he does.

Vol. VIII, T:47-16 to T:48-2.

Later in his summation the trial prosecutor argued that Judge Bissell concluded, after hearing the petitioner's testimony, that what petitioner "was doing was not right." The trial prosecutor stated, the following:

> Now in order to get this $450 back he had to explain it. He had to justify it, there was no way out. Unfortunately for him he didn't think that far ahead as to what was going to happen. Maybe

> he didn't know the nature of Judge Bissell. Maybe he didn't appreciate the fact that when a judge tries a case without a jury or even a jury the judge might just be paying attention to what the witnesses are saying . . .
>
> And surely didn't realize that the judge would be hearing him and understanding. He just didn't realize that the judge would have the basic intelligence to hear this and realize the implications of insurance fraud and turn it over to the Prosecutor's Office for investigation. He didn't realize that the trial judge sitting on a case that only involves a puny $450 would see beyond the triviality of that particular lawsuit and recognize the more important fact that what he was doing was not right.

Vol. VIII, T:64-23 to T:65-12.

Finally, the trial prosecutor theorized that the petitioner gave himself away before Judge Bissell because he had contempt for Judge Bissell and believed himself to be above the law. The trial prosecutor stated, as follows:

> The second reason you now know from seeing this petitioner and from hearing his testimony and hearing testimony about him; the second reason why he did that is because Dr. Himmelwright believes or thinks that he's above the law. As he sits there now he believes that he is above the law and nobody is, nobody is and surely he isn't. You see, he does care what a judge says. Judge Bissell told him something. It was at least related to him that this case might involve fraud that's going to

> go to the Prosecutor's Office. He didn't care what the judge sitting on the bench in his black robes says. He felt he was above the law.

Vol. VIII, T:64-23 to T:65-12.

In dismissing the petition the district court stated, contrary to petitioner's objection to the statements admission (Vol IV, T:120-23 to T:124-25) and the petitioner's trial testimony, (Vol. VI, T:85-15 to T:204-3), that "since the petitioner did not challenge the truth of Judge Bissell's statement it was unnecessary for the judge to actually appear at trial." (*infra,* 6a).

The district court went on to hold that the trial prosecution's use of the statement in his summation was "within the evidence and the legitimate inferences therefrom." (*infra,* 7a).

The petitioner also contended in the district court that his right to due process of law was violated by the failure of his trial judge, the Honorable Julius A. Feinberg, J.S.C., to disqualify himself from presiding over his trial. Petitioner asked for an evidentiary hearing in order to establish the facts supportive of his due process of law claim. The petitioner's claim was based upon the fact the trial judge's son, Paul Feinberg, Esq., was an "assistant" to Prudential's Office of General Counsel, which controlled and supervised Prudential's extensive participation in the investigation and prosecution of the petitioner (SA86a-87a). Petitioner argued that Prudential was more than a mere victim in the prosecution because: (1) it had a direct financial interest in the outcome of the case, since it stood to recover all of its alleged losses through restitution, N.J.S. 2C:43-2; (2) was, through its representative, a chief prosecution witness (Vols. III and IV); (3) was a co-investigator, along with the Essex County Prosecutor's Office, in an undercover operation which infiltrated the petitioner's

practice by placing a prosecutor's investigator, Jerry Simons,[3] in the petitioner's office as a patient, Count 11 of the indictment (SA at 129a-15 to 130a-4; Vol. IV, T:33-23 to T:34-4; Vol. IV, T:20-20 to T:21-6); (4) viewed itself as being the torchbearer of the entire insurance industry in combatting alleged fraud (Vol. IV, T:159-2 to T:162-19; T:163-6 to 8; T:164-5 to 11); and (5) was an advocate at the petitioner's sentencing hearing, along with the prosecution of the position that the court must make an example of the petitioner to deter other professionals who might be tempted to submit fraudulent insurance claim forms (Vol. X, T:12-2 to T:13-11).

The petitioner did not discover the existence of a relationship between the trial judge and Prudential, until after his conviction while he was on direct appeal. He then filed a motion with the Superior Court of New Jersey, Appellate Division asking for a remand to the trial court in order to conduct an evidentiary hearing concerning the question of the trial judge's duty to disqualify himself. The motion for remand was denied and a hearing was never conducted in the state court on petitioner's constitutional claim (*infra*, 4a-5a).

Petitioner argued in the district court that he was entitled to an evidentiary hearing because: (1) "the merits of factual dispute

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3. Jerry Simons testified before the grand jury, but was not called to testify by the prosecution at the petitioner's trial (SA128a to 141a), because on December 22, 1983 he entered a plea of guilty before the Honorable Julius A. Feinberg, J.S.C. to a one-count information charging him with theft by deception in violation of N.J.S. 2C:20-4, a crime in the third degree. Mr Simons' deception was that for 6 years while employed as an investigator with the Essex County Prosecutor's Office, he simultaneously held a "no-show" job with the Newark Board of Education, receiving approximately $30,000 per year from the Board of Education to which he was not entitled. On February 17, 1984 Judge Feinberg sentenced Simons to a 3-year probationary term, fined him $1,000 and imposed a $25 penalty. The Court did not order restitution (SA254a to 258a).

were not resolved in the state hearing," *Townsend v. Sain,* 372 U.S. 293, 313 (1963); (2) "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing," *id.*; and (3) "the material facts were not adequately developed at the state court hearing." *id.*

Most specifically the petitioner contended he had no access to any evidence in the state court because he was restricted to the submission of affidavits based upon personal knowledge and the individuals with the requisite knowledge were inaccessible to him. *See* the affidavit of Paul Casteleiro, Esq. submitted in support of the petitioner's motion for compulsory process (Ra7, DSA12-28). This procedure petitioner argued "was inadequate for the ascertainment of the truth." *Townsend v. Sain, supra* at 316.

In addition, petitioner argued that a hearing was necessary to determine the exact role Prudential's Office of General Counsel played in the petitioner's prosecution, including, but not limited to, whether or not *ex parte* communications occurred between the trial judge and Prudential.[4]

Furthermore, petitioner argued the district court could not accept without a hearing respondent's unsupported assertion that the trial judge's son had no interest or stake in the outcome of

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4. Prudential's Office of General Counsel considered the making of a sentence recommendation to be one of its functions (Affidavit of Paul Casteleiro dated 9/17/85, Paragraph 16, Defendant's Supplementary Appendix pp. 17-18).

In sentencing the petitioner the trial judge considered *ex parte* communications the contents of which were never disclosed to the petitioner or his trial counsel (Vol. X, T:21-25 to T:22-2). Whether or not Prudential's General Counsel had an *ex parte* communication with the trial judge is unknown since the petitioner was repeatedly denied an evidentiary hearing in the state court on this issue (*infra,* 4a-5a).

the case (*infra*, 6a). Finally, petitioner argued a hearing was necessary to determine whether the trial judge in presiding over the petitioner's case was faced with a situation which "would offer a possible temptation to the . . . judge to . . . lead him not to hold the balance nice, clear and true?" *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

The district court in ruling against the petitioner did not address itself to the issue of an evidentiary hearing (*infra*, 3a-10a) but merely held that the trial judge's failure to disqualify himself did not violate New Jersey's Code of Judicial Conduct. The district court never addressed itself to petitioner's due process claim. The district court stated as follows:

> Canon 3C(1) of New Jersey's Code of Judicial Conduct requires that a judge "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In accordance with 3C(d), he must also disqualify himself: (i) where a close relative is an officer, director, or trustee of a party; (ii) is a lawyer in the case; or (iii) is known by the judge to have an interest in the outcome. Petitioner argues that Prudential should be considered a party for the purpose of Canon 3C(d)(i), because the company had an important role and interest in the trial. Whether or not Prudential was a party, it is clear that Feinberg was not a company officer, director, trustee or legal representative in the case. According to his affidavit, Feinberg was employed in the Investment Section of the firm and had no involvement with insurance claims. He had no interest, financial or otherwise, in the outcome on the case. Therefore, it was unnecessary for Judge Feinberg to disqualify himself.

Infra, 5a-6a.

The district court having ruled there existed no probable cause for appeal (*infra*, 10a) the petitioner applied to the Court of Appeals for a certificate of probable cause. 28 U.S.C. § 2253. The Court of Appeals denied the application without an opinion (*infra*, 1a-2a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeal's decision and the decision of the district court are contrary to this Court's interpretation of the probable cause standard of 28 U.S.C. § 2253. Under 28 U.S.C. § 2253 a certificate of probable cause is necessary for a petitioner to appeal the denial of his 28 U.S.C. § 2254(a) petition for a writ of habeas corpus. The Court in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) stated that a petitioner must make a substantial showing of a denial of a federal right for the certificate to issue. The Court defined the standard, as follows:

> In requiring a "question of some substance" or a "substantial showing of the denial of a federal right," obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that court could resolve the issues in a different manner; or that the questions are "adequate to deserve encouragement to proceed further."

Id at 893, n.4.

The district court's decision dismissing the petitioner's contention that his right to a fair trial, his right to due process

of law and his right of confrontation were denied in his state court trial by the admission of a civil trial judge's hearsay statement expressing an opinion about the same type of conduct for which the petitioner was being prosecuted was without precedent. The district court in holding that "since petitioner did not challenge the truth of Judge Bissell's statement, it was unnecessary for the judge to actually appear at trial," (*infra*, 6a), created both a new exception to a criminal defendant's right of confrontation as well as New Jersey's hearsay rules.[5] In addition, the district court's decision creating new exceptions to the confrontation clause and the state's hearsay rules was based upon an incorrect factual premise, *i.e.*, that the petitioner did not challenge the truth of the statement, the petitioner having vehemently protested his innocence.

The long list of decisions rendered by this Court interpreting the Sixth Amendment's confrontation clause establish that the

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5. The statement's admission cannot be justified as being a permissible hearsay exception under New Jersey state law. In *State v. Bankston*, 63 N.J. 263 (1973) the Supreme Court of New Jersey specifically ruled statements such as the one in this case do not come within any hearsay exception and violate a criminal defendant's rights of confrontation. In *State v. Bankston, supra* at pp. 268-269, the following was stated:

> It is well settled that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of a crime by stating that he did so "upon information received." . . . Such testimony has been held to be admissible to show that the officer was not acting in an arbitrary manner or to explain his subsequent conduct . . . However, when the officer becomes more specific by repeating what some other person told him concerning a crime by the accused the testimony violates the hearsay rule. . . . Moreover, the admission of such testimony violates the accused's Sixth Amendment right to be confronted by witnesses against him.

Bankston, supra, at 268, 269, citations omitted.

district court's interpretation of the confrontation clause was wrong. Nevertheless, a certificate of probable cause did not issue from the Court of Appeals. As stated by this Court in *Ohio v. Roberts,* 448 U.S. 56, 65 (1980):

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi v. Stubbs,* 408 U.S. 204, 33 L Ed 2d 293, 92 S Ct 2308 (1972); *Barber v. Page,* 390 U.S. 719, 20 L Ed 2d 255, 88 S Ct 1318 (1968). See also *Motes v. United States, 178 U.S. 458, 44 L Ed 1150, 20 S Ct 993 (1900); California v. Green,* 399 U.S., at 161-162, 165, 167, n 16, 26 L Ed 2d 489, 90 S Ct 1930.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." *Snyder v. Massachusetts,* 291 U.S., at 107, 78 L Ed 674d, 54 S Ct 330, 90 ALR 575.

Not only did the petitioner make a substantial showing of a denial of a right of confrontation, but he also made a substantial

showing, by analogy, that his right to a jury trial was denied by the admission of the hearsay statement of the civil trial judge. The district court, however, never addressed itself to the petitioner's claim that his right to a jury trial was infringed by the statement's admission.

The petitioner established that by looking to this Court's decisions dealing with improper comments of a trial judge to a jury that it could be seen that the admission of the statement violated petitioner's right to a jury trial. In *Starr v. United States,* 153 U.S. 614 (1894) the Court set forth the reasons why a judge must remain, at all times, impartial before a jury, the Court stated as follows:

> It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly a great weight, and that his lightest word or intimation is received with deference, and may prove controlling. *Hicks v. United States,* 150 U.S. 442, 452. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances.

Id at 626.

In *Quercia v. United States,* 289 U.S. 466 (1933) the Court reversed the conviction of the appellant based upon the trial judge's comments to the jury that the petitioner's conduct while he testified indicated he was lying. The conduct the trial judge in *Quercia,*

supra, cited was the petitioner's act of wiping his hand. The Court stated, in *Quercia, supra,* at p. 472, as follows:

> The trial judge's characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to execute a prejudice which would preclude a fair and dispassionate consideration of the evidence.

Judge Bissell's hearsay statement not only established to the jury that he believed petitioner to be lying, but that based upon that belief, he was compelled "in discharging" his "duty": (1) to take affirmative action by conferring with the "Fraud Squad of the Essex County Prosecutor's Office"; (2) ordering a transcript of the testimony for the prosecutor's review; (3) retaining the documents in evidence; and (4) "officially" referring the case to the Prosecutor's Office. In other words the hearsay statement constituted a clear statement to the jury that the judge believed the petitioner committed the crimes alleged.

The use of the statement by the prosecution to argue to the jury that the petitioner was not to be believed because a judge did not believe him further exacerbated the constitutional violations. The issue of statements admission unmistakeably established a substantial question that the petitioner was denied a federal right. *Barefoot v. Estelle, supra.* The decisions in this case in the courts below are contrary to: (1) the decisions of this Court concerning the confrontation clause, *Ohio v. Roberts, supra;* (2) the decisions of this Court concerning a criminal defendant's right to a trial by jury; *Quercia v. United States, supra;* and (3) the decision of this Court regarding issuance of a certificate of probable cause. *Barefoot v. Estelle, supra.*

The departures by the courts below from accepted

constitutional principles warrants the issuance of a writ of certiorari.

2. In the district court there was no evidentiary hearing on the petitioner's claim that his right to due process of law was violated by the trial judge's failure to disqualify himself. Nevertheless, the district court, based upon the affidavit of the trial judge's son, submitted in the state court, determined that because neither the trial judge nor his son had any financial interest in the prosecution, the trial judge was under no duty to disqualify himself under New Jersey's Code of Judicial Conduct (*infra,* 5a-6a). The district court never determined or addressed itself to the allegations that the petitioner's right to due process of law was violated. Despite the fact that the petitioner did not have an evidentiary hearing, contrary to both 28 U.S.C. § 2254(d)(1) (2) and (3) and the holding of this Court in *Townsend v. Sain,* 372 U.S. 293 (1963), or a ruling on his due process claim, the Court of Appeals denied his application for a certificate of probable cause (*infra,* 1a-2a).

This case represents a total departure from this Court's holding in *Townsend v. Sain, supra,* as well as being contrary to the mandates of 28 U.S.C. §2254 (d)(1) (2) and (3). The petitioner presented the facts bearing upon the issue of his due process claim which he was able to ferret out without the benefit of a hearing. The facts developed were not really disputed by the respondents. A hearing to develop the facts which necessarily arose from the established facts was required yet both the district court and the Court of Appeals refused to follow the applicable law. *Townsend v. Sain, supra;* 28 U.S.C. § 2254 (d)(1) (2) and (3).

In *Townsend v. Sain, supra,* at p. 313 (1963) the Court set forth the standards governing when a district court must conduct an evidentiary hearing to determine the merits of a habeas corpus

petition submitted by a person in state custody. The Court, stated as follows:

> We hold that a Federal Court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state's court hearing or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

The petitioner submitted to the Court of Appeals and the district court that under the first, third, and fifth particularized circumstances of *Townsend, supra* and 28 U.S.C. § 2254(d)(1) (2) and (3) he was entitled to an evidentiary hearing. Neither the Court of Appeal nor the district court ever addressed themselves to the issue.

It is submitted that the district court concluded, based upon the affidavit of the trial judge's son and the bald assertions of the respondents, that the petitioner's allegations did not fit within a specific proscription of the State Code of Judicial Conduct, therefore there was no need to address the issue of an evidentiary hearing on the petitioner's due process claim. The procedure employed by the district court in accepting the trial judge's son's affidavit was proscribed by this Court in *Walker v. Johnson,* 312 U.S. 275 (1941). The Court stated in *Walker v. Johnson, supra*, at pp. 286-287, as follows:

> It is true that they (petitioner's constitutional claim) are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who make them must be subjected to examination or tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

Not only did the district court fail to follow this Court's holding in *Townsend v. Sain, supra,* and *Walker v. Johnson, supra,* and the mandates of 28 U.S.C. § 2254(d)(1) (2) and (3), it failed to render a ruling on the petitioner's due process claim opting intend to analyze the claims based purely upon the State Code of Judicial Conduct. The Court of Appeals compounded the district court's errors by declining the issue of certificate of probable cause despite the fact that the petitioner "made a substantial showing of denial of a federal right." *Barefoot v. Estelle, supra,* p. 893.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL CASTELEIRO
Attorney for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

December 22, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 88-5731

VICTOR F. HIMMELWRIGHT

v.

WILLIAM H. FAUVER, ET AL.

(D.N.J. Civ. No. 88-132)

Present: BECKER, HUTCHINSON AND COWEN,
Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of probable cause, pursuant to *Rule* 22(b), *Federal Rules of Appellate Procedure*

(2) Appellees' opposition to the issuance of certificate of probable cause

in the above captioned case

Respectfully,

Appendix A

s/ Sally Mrvos (JKN)
Clerk

SM/JKN/zm
enc.

The foregoing motion for a certificate of probable cause is DENIED.

By the Court

s/ J.R. Becker
Circuit Judge

Dated: DEC 29 1988

FILED DEC 30 1988

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 88-132

HON. NICHOLAS H. POLITAN

VICTOR F. HIMMELWRIGHT,

Petitioner,

v.

WILLIAM H. FAUVER, etc., et al,

Respondents.

OPINION AND ORDER

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Appendix B

POLITAN, District Judge

Petitioner brings this application pursuant to 28 U.S.C. § 2254 which provides this Court with the authority to issue a Writ of Habeas Corpus for a person in custody as a result of a judgment of a State Court. The statute gives a district court the authority to determine whether custody of the petitioner is in violation of the Constitution of the United States.

Petitioner was a psychologist licensed in New Jersey and treating patients out of offices in Montclair and Summit. He practiced individual therapy in private sessions, group therapy, "marathon" group sessions and seminars. He also used his residence as part of a "therapeutic community" and he ran a clinic. He was training some of his patients to become "analysts", and they gave therapy to other patients and conducted seminars.

Between June 1977 and October 13, 1980, petitioner submitted false claims for insurance reimbursement from Prudential Insurance Co. ("Prudential") on behalf of nine of his patients and one undercover investigator posing as a patient. The false billings fell into several categories: (1) billing for private sessions never conducted; (2) billing group sessions as private; (3) billing marathons or seminars as group or private sessions; (4) billing for sessions not conducted by a licensed therapist; and (5) billing Prudential at a higher fee for private sessions than he quoted to his patients.

On June 22, 1984 the Superior Court of New Jersey, Law Division, Essex County, convicted petitioner of obtaining money under false pretenses and theft by deception. He was sentenced to a term of eight years and ordered to make restitution to Prudential in the amount of $38,360. He filed a motion with the

Appendix B

Appellate Division for a remand in order to conduct an evidentiary hearing on the question of whether the trial judge should have disqualified himself at trial. The petition was denied on February 27, 1985. On June 27, 1986 the Appellate Division affirmed his conviction and remanded to the trial court on the question of the calculation of the amount of restitution owed under the judgment. Petitioner then filed a petition for certification to the Supreme Court of New Jersey. The petition was denied on October 17, 1986. Petitioner is presently on parole.

Petitioner has met the exhaustion requirement under 28 U.S.C. § 2254(b), which requires that he first present his claims to the state courts. It is not required that those courts have considered or discussed the claims in an opinion. *See Picard v. Connor,* 404 U.S. 270, 275 (1971). The State argues that the petitioner has not exhausted his state remedies because he did not present due process arguments to the Supreme Court of New Jersey in connection with his "cumulative error" claim. Petitioner, however, presented both the legal theory and the facts upon which his federal claim rests to the state courts. Therefore, the issue has been exhausted. *Gibson v. Scheidelmantel,* 805 F.2d 135, 138 (3d Cir. 1986); *Picard v. Connor,* 404 U.S. at 277. Petitioner has also met the custody requirement for this petition because a prisoner released on parole is still in custody. *Jones v. Cunningham,* 371 U.S. 236 (1963).

The petitioner avers that Judge Feinberg was biased and should have disqualified himself from trial because his son, Paul S. Feinberg, Esq., was employed by Prudential as an Assistant General Counsel. Canon 3C(1) of New Jersey's Code of Judicial Conduct requires that a judge "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In accordance with 3C(d), he must also disqualify

himself: (i) where a close relative is an officer, director, or trustee of a party; (ii) is a lawyer in the case; or (iii) is known by the judge to have an interest in the outcome. Petitioner argues that Prudential should be considered a party for the purpose of Canon 3C(d)(i), because the company had an important role and interest in the trial. Whether or not Prudential was a party, it is clear that Feinberg was not a company officer, director, trustee or legal representative in the case. According to his affidavit, Feinberg was employed in the Investment Section of the firm and had no involvement with insurance claims. He had no interest, financial or otherwise, in the outcome of the case. Therefore, it was unnecessary for Judge Feinberg to disqualify himself.

Second, petitioner argues that his trial was prejudiced by the admission of a statement made in another action by Judge John Bissell, the judge in a prior civil action involving petitioner. In that case, petitioner sought to collect unpaid fees from a patient. During trial, he gave testimony as to his billing methods. The testimony prompted Judge Bissell to contact the Essex County Prosecutor's Office and provide them with a transcript of the proceedings in the civil action. Judge Bissell stated his intentions in open court. This statement was admitted into evidence in petitioner's criminal trial at the request of the prosecution to show the origins of the criminal charges. Petitioner argues that the admission of this statement violated his rights of a jury trial and of confrontation. The confrontation clause, however, was meant to provide accused persons the right to cross-examine witnesses and determine whether their testimony is credible. *See California v. Green,* 399 U.S. 149 (1970). Since petitioner did not challenge the truth of Judge Bissell's statement, it was unnecessary for the judge to actually appear at trial. Furthermore, the statement did not contain an opinion nor express a position as to the merits of petitioner's criminal case. Therefore, admission of this statement

did not deprive petitioner of a fair trial.

Petitioner also objects to the use of this statement in the prosecutor's summation. However, the summation was not improper because the prosecutor was entitled to wide latitude as long as he stayed "within the evidence and the legitimate inferences therefrom." *State v. Mayberry*, 52 N.J. 413, 437 (1968). This Court concludes that petitioner stayed within those boundaries.

Third, petitioner avers that the trial court violated his right to due process of law by relieving the prosecution of its burden of showing the specific misrepresentations made by the petitioner on ten of the eleven counts of the indictment. When a prisoner challenges his conviction on the basis of insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The State presented the testimony of Dr. Himmelwright's former secretary, who stated that she was instructed to bill Prudential differently than the patient. There was also testimony from the Economic Crimes Investigator of the Essex County Prosecutor's Office comparing petitioner's diaries, patient billing records, patient files and claims submitted to Prudential. These documents were admitted as evidence for the jury to see. Furthermore, patients themselves testified as to their experiences with Dr. Himmelwright.

The burden is on the State to show that the accused obtained the property of another by misrepresentation, and that the victim relied upon the misrepresentation. *See State v. Boratto,* 154 N.J. Super. 386 (App. Div. 1977). The prosecution produced sufficient

evidence for a rational juror to find guilt beyond a reasonable doubt.

Fourth, petitioner argues that the trial judge made improper comments and thereby violated petitioner's rights to a jury trial and due process of law. For the purposes of habeas review, the petitioner must demonstrate that the trial judge's conduct violated some right guaranteed him by the Fourteenth Amendment. *See Cupp v. Naughten,* 414 U.S. 141, 146 (1973). During a discussion between the Judge and the attorneys, the witness began to speak. The Judge told him to keep quiet and stated: "Of all people, you're the last one I want to hear from."

At another point during the trial, petitioner was evasive in his answer to a question and the Court stated that it would not allow "fudging" on questions or answers. As the State points out; "due process requires that the trial judge conduct and control a trial so that it is fair and orderly." *United States v. Nobel,* 696 F.2d 231, 237 (3d Cir. 1982). At petitioner's trial, the Judge was trying to maintain order, avoid delay, and protect the fairness of the proceedings. Furthermore, the jurors were instructed to disregard "temper outbursts" from either the Court or the attorneys. Therefore, petitioner's rights were not violated.

Finally, petitioner avers that the cumulative nature of the trial "errors" deprived him of a fair trial. He refers to his first four arguments, and adds that the admission of evidence concerning statements and activities outside the scope of the indictment was improper. He argues that testimony concerning his dealings with other insurance companies showed nothing more than that he was pre-disposed to committing the crime, and was therefore in violation of Rule 55 of the New Jersey Rules of Evidence which provides "evidence that a person committed a

crime or civil wrong . . . is inadmissible to prove his disposition to commit crime or civil wrong." Biunno, *New Jersey Rules of Evidence,* Rule 55 (1988). The State argues that the exceptions to Rule 55 allow the admission of evidence showing that a person committed prior crimes or civil wrongs to prove motive, intent, plan, knowledge, identity, or to show absence of mistake or accident. *See N.J. Rules of Evidence,* Rule 55 (1988).

Patient Ingersoll testified that petitioner offered to bill her insurance carrier so as to assure her full reimbursement for her therapy. He recommended that she take a marathon group and offered to bill it as private therapy. Testimony such as this went to the heart of the issue at trial: whether the doctor possessed the requisite intent to deceive the insurance company.

Petitioner also objects to the admission of expert testimony comparing his practice to that of others in his field because his reputation was not at issue. This testimony, however, was relevant to the question of what was properly billable to the insurance company.

Petitioner avers that this Court should grant his petition because certain questionable evidence was admitted at trial. This includes a letter from a patient requesting advice on how to claim the therapeutic center as a hospital for income tax purposes. It also includes all testimony concerning the low-cost clinic, which was not mentioned in the indictment. The Judge has wide discretion over admissibility of relevant evidence. He must rely upon his experience, knowledge and understanding to make a determination of admissibility. *See State v. Allison,* 208 N.J. Super. 9 (App. Div. 1985). Furthermore, "[i]t is a well-established principle that evidentiary errors of State Courts are not considered to be of constitutional proportion, cognizable in federal habeas

corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Bisaccia v. Attorney General of N.J.*, 623 F.2d 307, 312 (3d Cir. 1980).

For the purpose of habeas review, the appropriate test is "harmless error". *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986). "If the petitioner had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors are subject to harmless error analysis." *Rose v. Clark*, ____ U.S. ____, 106 S.Ct. 3101, 3106-7 (1986). Therefore, even when this Court detects an error upon review, it must further determine whether or not that error caused actual harm to the petitioner. Accordingly, this Court finds that it was well within the trial court's discretion to admit the disputed evidence. If certain admissions were in error, however, the petitioner was not harmed, as the other evidence admitted overwhelmingly supported the jury's verdict.

For the reasons stated herein, the petition is dismissed.

There is no probable cause for appeal.

SO ORDERED.

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

Dated: August 23, 1988.

FILED AUG 23 1988
ENTERED AUG 25 1988

APPENDIX C — ORDER OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
C-179 SEPTEMBER TERM 1986

25,997

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

VICTOR F. HIMMELWRIGHT,

Defendant-Petitioner,

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4931-8374 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 15th day of October, 1986.

s/ Stephen Townsend
Clerk of the Supreme Court

FILED OCT 17, 1986

APPENDIX D — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4931-83T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VICTOR F. HIMMELWRIGHT,

Defendant-Appellant.

Argued June 10, 1986 — Decided June 27,1986

Before Judges Pressler, Bilder and Gruccio.

On appeal from Superior Court, Law Division, Essex County.

Paul Casteleiro argued the cause for appellant (Mr. Casteleiro, attorney for appellant; Mr. Casteleiro and John Paul Dizzia, of counsel and on the brief).

Mary Ellen Halloran, Deputy Attorney General, argued the cause for respondent (W. Cary Edwards, Attorney General, attorney for respondent; Ms. Halloran, of counsel and on the brief).

Appendix D

PER CURIAM

Tried to a jury, defendant Victor Himmelwright, a licensed psychologist, was convicted of six counts of third degree theft by deception, *N.J.S.A.* 2C:20-4; two counts of fourth degree theft by deception, *N.J.S.A.* 2C:20-4; two counts of obtaining money by false pretenses, *N.J.S.A.* 2A:111-1; and one count of attempted theft by deception, *N.J.S.A.* 2C:5-1 and *N.J.S.A.* 2C:20-4. He was sentenced to an aggregate prison term of eight years, fined a total of $40,500 and ordered to make restitution to Prudential Insurance Company of $38,360. He was paroled pending appeal.

On appeal he makes the following contentions:

> 1. By failing to disqualify himself the trial judge violated defendant's rights under New Jersey statutes and codes, the United States Constitution's Fourteenth Amendment due process clause and Article I, Section 1 of the Constitution of the State of New Jersey.
>
> 2. The court below violated defendant's constitutional right to a jury trial and his right to due process of law by admitting into evidence the statement of a judge relevant to the issue of guilt and by permitting the prosecutor to comment on the statement during the summation.
>
> 3. The court violated defendant's right to due process of law under the United States and New Jersey Constitutions by failing to enter judgment of acquittal with respect to counts I through 9 and II, the State having failed to prove each element

of the offense charged beyond a reasonable doubt.

4. The trial judge's improper consents violated defendant's constitutional right to a jury trial and his right to due process of law.

5. The trial court committed reversible error in permitting the prosecutor to attack the ethics of defendant's practice of psychology.

6. The trial court committed reversible error in permitting under *Evid. R.* 55 the introduction of extensive evidence outside the scope of the indictment, of alleged acts and statements of defendant.

7. The trial court committed plain error in not issuing a limiting instruction to the jury regarding its use of the *Evid. R.* 55 evidence.

8. The trial court committed reversible error in not ordering disclosure of Prudential's alleged letters to defendant.

9. The admission into evidence of the charts, S-17, was prejudicial and requires reversal.

10. In imposing sentence the trial judge considered materials not disclosed to defendant, rendering his sentence illegal.

11. The sentence of defendant was manifestly excessive.

Appendix D

12. The trial court abused its discretion in ordering restitution in the amount of $38,360.

13. The trial court erred in denying defendant's motion to suppress.

14. The indictment was defective on its face. (Not raised below).

15. The cumulative nature of the trial errors deprived defendant of a fair trial.

We have considered each of these issues in light of the record and the argument of counsel thereon and we are satisfied that each is clearly without merit. *R.* 2:11-3(e)(2).

We observe that defendant made no challenge to the amount of restitution ordered either during the sentencing proceeding or by way of a motion for reconsideration of sentence pursuant to *R.* 3:21-10. Defendant contends that the trial court abused its discretion in ordering restitution in the amounts specified in counts one through ten of the indictment. Defendant claims that Investigator Victor Panico erroneously arrived at the amounts defrauded from Prudential, and therefore, the trial court based its restitution order on inaccurate figures. He states Panico did not credit him for the fees for the group sessions that were actually held (although billed as private sessions) and that instead, he entered into the computation the entire cost of the private sessions.

At oral argument the State conceded that the amount of restitution was apparently miscalculated. We therefore directed counsel to attempt amicably to adjust the amount. In the event

they are unable to agree within 20 days of the date hereof, defendant shall so advise the trial court which shall then make a factual determination of the correct amount of restitution due and owing.

Except for the foregoing directives regarding restitution, we affirm the convictions appealed from.